

NASA Langley

Office of Chief Counsel

Newsletter



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I'm very excited to provide you the inaugural issue of the NASA Langley Research Center (LaRC) Office of Chief Counsel (OCC) Newsletter. It is our hope to use this Newsletter to provide you with guidance on a variety of legal issues you may face in the course of carrying out the LaRC mission. It is filled with timely, informative and interesting articles covering a broad legal spectrum.

This issue contains articles providing guidance on FY2010 Cross Agency Support (CAS) appropriations, NDA's, Reprisal, outside teaching, speaking or writing, inventions, copyright, and patent awards. We have also included a "Dear Counsel" question and answer section in a fun format, a "legal kudos" award section, and we even lighten things up with a "Lawyer Humor" column.

OCC's goal for its Newsletter is to help ensure LaRC receives useful, accurate, and timely legal advice in a way that reaches the maximum number of employees. We intend to publish three issues of The LaRC OCC Newsletter annually. We would really appreciate any feedback you, our readers would kindly provide. If you would like to see an article on a specific topic, please let us know, and we'll attempt to include it in an upcoming issue. We all hope you enjoy and benefit from this Newsletter.

I'd like to give my thanks to all the attorneys and staff who contributed to this issue.

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LaRC Chief Counsel

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Business Law News

Changes to FY2010 Cross Agency Support (CAS) Appropriation Affects LaRC Operations

One of the larger appropriations accounts in NASA's \$18.7 billion budget is CAS, which includes Center Management and Operations (CM&O), the Strategic Capabilities Asset Program (SCAP), NESC, IPP, Agency Management (including such organizations as IPAO), IT, earmarks and reimbursable funds. The CAS account is approximately \$3.2 billion, of which CM&O is \$2.2 billion. Approximately one-third of LaRC's budget consists of CM&O funds, and other activities, such as the NESC, also are funded through the CAS account.

Until FY2010, CAS funds, like virtually all other NASA accounts, were available for obligation for two years. This year, however, Congress mandated that CAS funds are available for obligation only for one year, i.e., they must be obligated by 30 September 2010. This change is impacting LaRC activities in a significant way. In order to ensure FY2010 CAS funds are obligated correctly, users must determine if the goods or services to be acquired with such monies are a bona fide need of this fiscal year. Failing to use these funds properly can carry severe personal penalties for violations of the Anti-deficiency Act.

The bona fide need concept relates to appropriations law. The US Code states that funds appropriated by Congress are available for obligation for a definite period (in this case, one year) to cover expenses properly incurred during the period of availability, and cannot be obligated beyond the period authorized by law. To determine if the need is one of this fiscal year, one must see if the goods or services are necessary for the current fiscal year. For goods, the process is fairly straightforward. If an item is needed this year, or must be ordered now to be available to meet a known future requirement, it is a bona fide need of this year.

For services, the rules are more complicated. One must determine if the service is severable or non-severable. A severable service is one in which a benefit is received when the service is rendered. For example, cutting the lawn is a severable service because the Government receives a benefit each time the lawn is cut, even though the contract is for more than a single mowing. Similarly, clerical services are severable because we obtain a benefit each time the service is rendered. Funding for such contracts cannot cross fiscal years. On the other hand, a non-severable service is one involving a single undertaking with a specific outcome. Most research falls in this category because until the research is completed and the report or item is delivered, the Government has not received a benefit. Such contracts may cross fiscal years, but all funding must be provided from the fiscal year in which the need arose. If an R&D contract is awarded in FY2010, all funding for that contract must be FY2010 funds, even though the work may last several years.

As you can see, there are potentially challenging issues to be confronted when determining whether CAS funded contracts can be funded across fiscal years. To assist you, OCFO, OCC and OP have devised an eight question checklist to provide insight as to whether the service is severable or not. Information has been provided on the OP Outreach Website, which can be accessed through the @LaRC quick links. In addition, we stand ready to assist you in ensuring appropriations law requirements are met and you are able to obtain the goods and services you need in a timely fashion.

Non-Disclosure Agreements

Have you ever been asked to sign a Non-Disclosure Agreement (NDA) before a company will share its proprietary information with you?

As a NASA employee, you should never be required to execute an NDA. If you do, it's a contract between you and the company and can be enforced against you – not NASA. But there is a more fundamental reason not to execute an NDA. NASA Office of General Counsel policy is that NASA should rely on the existence of 18 U.S.C. § 1905 (the Trade Secrets Act) in order to avoid the execution of an NDA. Under 18 U.S.C. § 1905, NASA employees are subject to criminal prosecution and removal from office for wrongful disclosure of confidential and/or proprietary data/information. Conviction under this statute can result in fines imprisonment, or both. Proponents of an NDA are normally willing to rely on this criminal statute once they are made aware of its existence and impact.

Additionally, if the owner of the proprietary data insists on additional assurances beyond the existence of 18 U.S.C. § 1905, you may provide the owner with an individual acknowledgement of the applicability of 18 U.S.C. § 1905. OCC can provide you with a form for such an acknowledgement that: (1) provides assurance to the proprietary data owner in the form of an executed document, and (2) serves to remind you, as a NASA employee, of your responsibilities with respect to the protection of proprietary data/information. Such a written acknowledgement does not increase your personal liability (from either a criminal or civil perspective). In other words, your responsibilities and liabilities are the same with or without a signed acknowledgement.

In rare cases, NASA can rely on its Space Act Authority to execute a NASA NDA with a company, but it will take the form of a Space Act Agreement (SAA) and not the corporation's typical commercial NDA.

Finally, if you encounter a situation where an NDA becomes an issue, you should first consider whether a procurement contract or SAA already exists or should be executed to govern the relationship between the parties. Procurement contracts and SAAs contain information protection requirements and assurances that generally preclude the need for any additional non-disclosure requirements. OCC is here to assist you with these considerations.

Procurement Corner

As the Center moves to its new strategic plan to engage in cutting-edge R&D and project management, the blended workforce poses an ever present potential for Organizational Conflicts of Interest (OCIs) that could become show stoppers if they are not identified and addressed early. OCIs occur when a contractor employee is in a position where the interests of his or her employer conflict with those of the Government (e.g., evaluating its own work, structuring requirements in a way that favors its products or services, or obtaining access to information that provides it an unfair competitive advantage in future procurements). The FAR requires contracting officers to analyze planned procurements to avoid, neutralize or mitigate OCIs as early in the process as possible. Therefore, COs must analyze, document and act to preclude these issues. To assist you, OCC has provided training charts and an OCI Primer, complete with a series of checklists for your use in analyzing OCI plans and to recognize the various types of OCIs that can arise in different procurements. These items are available through the OP Link. As always, we are available to provide advice and assistance as COs and program personnel perform this work to ensure we obtain objective, unbiased products from our contractors.

Personnel Points

An Employee's EEO Complaint: Not a good topic for Water Cooler Conversation

Employees have a right to file an Equal Employment Opportunity (EEO) complaint alleging discrimination, participate in the EEO process, or oppose any discriminatory employment policy of the agency. In light of the employee's right, it is unlawful to restrain, interfere, coerce, or discriminate against employees (complainants), their representatives, and witnesses. If such actions occur by the employer, it is called reprisal. The employee will then have a right to file a complaint of discrimination on the basis of reprisal. The basis for a reprisal claim affords an employee the ultimate protection of freedom to engage in the EEO process.

There are some instances where what appears to be harmless work place conversation is equal to reprisal. Here is an example of a case filed with the Equal Employment Opportunity Commission (EEOC):

An Administrative Clerk, employed with the Department of Homeland Security complained that her supervisor berated and verbally assaulted her and assigned her work tasks in an unfair manner. As a result, she filed a complaint of discrimination and alleged that her supervisor discriminated against her in violation of Title VII of the Civil Rights Act of 1964 and the Rehabilitation Act of 1973.

After the employee's complaint of discrimination was filed, her supervisor openly discussed the complaint with her co-workers. The reason the supervisor discussed her complaint of discrimination was for the purpose of soliciting testimony from other employees. The supervisor's intent was not to discriminate or retaliate against the employee for filing the complaint of discrimination.

The EEOC ruled that the supervisor's use of berating language and comments to the employee did not amount to discrimination. However, the fact that the supervisor openly discussed her complaint of discrimination with other employees was reasonably likely to deter a potential complainant from engaging in the EEO process. As a result, the supervisor's actions were tantamount to reprisal.

Ethics Edicts

Outside teaching, speaking and writing activities

LaRC employees often attain a high level of expertise in their work. As a result, many LaRC employees are sought out to teach, speak, or write in their outside capacity on topics in which they are considered experts. In such cases, generally, an employee, including a special Government employee, may not receive compensation from any source other than the Government for a teaching, speaking or writing outside activity that relates to the employee's official duties. An exception does permit any employee to receive compensation for teaching that relates to official duties if the teaching involves multiple

presentations as part of a regularly established curriculum. There is also an exception that permits an employee at the GS-15 and below level to accept travel payments as a form of compensation for outside teaching, speaking, or writing.

The questions of whether outside teaching, speaking, or writing relates to an employee's official duties, whether teaching falls into the exception regarding compensation, or whether an employee may accept travel compensation are based upon factors set forth in ethics regulations governing outside activities.

The answers to these questions are necessarily based on each employee's individual situation and require insight into applying the ethics regulations. Additionally, there are guidelines related to proper use of the NASA name and an employee's NASA title or position in association with the teaching, speaking, or writing; and employee's must complete an LF 106, Outside Employment Approval Form to obtain supervisory approval and Office of Chief Counsel (OCC) concurrence on the outside employment.

Consequently, an employee should not attempt to resolve questions about compensation, use of official title, and use of resources associated with outside teaching, speaking, or writing without the benefit of advice from a LaRC ethics counselor. Our ethics counselors have many years of experience addressing these questions and can help ensure that accepting compensation, using one's title, and using NASA resources is permissible in a given situation.

If you have questions about outside teaching, speaking, or writing or just outside employment in general, please contact either Ken Goetzke or Pete Polen, both of whom serve as the primary LaRC Deputy Ethics Counselors. You may reach Ken @ 4-7390 or Pete @ 4-3225

Ethics enlightenment . . . Outside Employment

NASA ethics regulations beginning at 14 C.F.R. § 6901.101 address outside employment. Most outside employment in which NASA employees engage requires prior supervisor approval. To obtain this approval, an employee must complete an LF 106, Request for Approval for Outside Employment (available through LMS Langley Forms) and submit it to their supervisor. An OCC ethics counselor must concur on the request. Once the request is approved and OCC has concurred, the approval is good for 3 years. If the outside employment will continue beyond 3 years, a new approval is required that should be submitted before expiration of the initial approval. Upon a significant change in the nature of the outside employment or in the employee's NASA position, the employee must also submit a revised request for approval. The approval will be retained in OHCM for the duration of the requester's NASA employment.

Employees who complete either a Public Financial Disclosure Form 278 or Confidential Financial Disclosure Form 450 must list the outside employment in the appropriate sections of each form.

Intellectually Speaking

Why Your Inventions are Important.

The United States Government in general and NASA in particular, employ many of the finest scientific and technical personnel available in the world. Many scientists and engineers, however, are unaware that patent protection for inventions is very important to the Government and to Government employees.

Patents are of considerable value to Government employee inventors in several ways.

- A monetary incentive award is given to the inventor upon the filing of a patent application in the U.S. patent and Trademark Office (USPTO).
- Supplemental Inventions and Contributions Board (ICB) awards may also be given to NASA inventors for significant inventions.
- An award is given to the inventor when a NASA Tech Brief is approved for publication.
- An award is available when software is initially released to a qualified user (including both internal project users and external users who receive the software through LaRC's Software Release Program).
- NASA employees share in license royalties if NASA licenses an invention.
- Depending upon the circumstances under which the invention was made, commercial rights may be retained by the inventor.
- Having a patent issued enhances the inventor's professional prestige.

The value to the Government of patents on Government employee inventions is twofold. First, they help to protect the Government from potential infringement claims and suits for money damages. In order to carry out the various missions of NASA, it is necessary to buy and use products developed in many fields of technological development. Therefore, NASA, as well as its contractors, is involved in enormous research and development efforts to provide the items necessary to improve the effectiveness of NASA. Patents serve to help protect NASA against payment of royalties for using technology, which was first developed by a NASA inventor, and provide protection against multimillion-dollar infringement claims and suits. Second, NASA has always been a leader in the Government in the transfer of its technology to the private sector. Obtaining patents is a key component of NASA's technology transfer activities because patents allow full public disclosure while providing exclusivity in order to lay a foundation for business investment and development. Patents facilitate rapid commercialization of an invention through licensing agreements with commercial firms. Third, patents help to convey the creativity and innovation of NASA's employees, and the importance NASA plays in the nation's technological advancements.

Congratulations to inventors of recently issued U.S. Patents

<u>Patent No.</u>	<u>Issue Date</u>	<u>Title</u>	<u>Inventors</u>
7,623,993	11/24/2009	Method And System To Perform Energy-Extraction Based Active Noise Control	Atul Kelkar (Iowa State) Suresh M. Joshi (NASA)
7,647,543	1/12/2010	Reprogrammable Field Programmable Gate Array With Integrated System For Mitigating Effects Of Single Event Upsets	Tak-kwong Ng (NASA) Jeffrey A. Herath (NASA)
7,647,771	1/19/2010	Thermally Driven Piston Assembly And Position Control Therefor	Donald L. Thomsen III (NASA) Robert G. Bryant (NASA)
7,649,439	1/19/2010	Flexible Thin Metal Film Thermal Sensing System	Donald L. Thomsen III (NASA)
7,655,595	2/2/2010	Sol-Gel Based Oxidation Catalyst And Coating System Using Same	Anthony N. Watkins (NASA) Bradley D. Leighty (NASA) Donald M. Oglesby (Swales) JoAnne L. Patry (Swales) Jacqueline S. Schryer (Swales)
7,666,939	2/23/2010	Dispersions Of Carbon Nanotubes In Polymer Matrices	Kristopher E. Wise (NIA) Cheol Park (NIA) Emilie J. Siochi (NASA) Joycelyn S. Harrison (NASA) Peter T. Lillehei (NASA) Sharon E. Lowther (NASA)
7,667,847	2/23/2010	Photogrammetric System And Method Used In The Characterization Of A Structure	Adrian A. Dorrington (NRC) Thomas W. Jones (NASA) Paul M. Danehy (NASA) Kent A. Watson (NIA) John W. Connell (NASA) Richard S. Pappa (NASA) W. Keith Belvin (NASA)
7,675,619	3/9/2010	Micro-LiDAR Velocity, Temperature, Density, Concentration Sensor	Paul M. Danehy (NASA) Adrian A. Dorrington (NRC)
7,683,797	3/23/10	Damage Detection/Locating System Providing Thermal Protection	Stanley E. Woodard (NASA) Thomas W. Jones (NASA) Bryant D. Taylor (Swales) Qamar A. Shams (NASA)

Intellectual Property Corner

Did You Know?

Publishers often provide copyright agreements to NASA employee authors of papers for signature. These agreements usually have problematic provisions - such as assignment of copyright to the publisher, which the NASA employee author is not authorized to grant. Authors should seek guidance from OCC prior to executing any publisher's agreement. Generally, a letter granting permission to publish is provided by OCC to the publisher in lieu of their agreement.

Timely review and approval by OCC of technical papers submitted to the Technical Publication Submittal and Approval System (TPSAS) can be greatly facilitated if the author identifies any third-party content at the time the paper is submitted to TPSAS. This identification can be included in the "Author's Comments" section, and should identify the page(s) on which the third-party content appears, the source(s) of the third-party content, and any additional information that may be helpful - such as any permissions obtained.

Example: 3rd party content consists of two photographs (Figures # and #) from [identification] website, listed in reference number #.

Dear Counsel

NO MORE FANCY FACE!

Dear Counsel,

Don't take this the wrong way, but it looks like you've been working some late nights here at LaRC. I have a second job selling *Fancy Face Products*. We have some fabulous serum which will really help reduce your puffy eyes and tame those laugh lines. I have an order form posted on my office door so just drop by, sign-up, and leave me a check. Or you can send an e-mail to me at Jane.Doe@nasa.gov

See you soon,
Fancy

Dear Fancy,

Don't take this the wrong way, but you're likely violating several ethics rules! You are prohibited from using your position, title, or any authority associated with your office to: 1) induce a benefit to yourself or anyone with whom you are affiliated, and 2) imply that the Government endorses personal activities or products or services (5 CFR

Dear Counsel, continued

2635.702). You work for Fancy Face Products, which is a non-federal entity; accordingly, you may not solicit business for Fancy Face Products or yourself from your coworkers. Prohibited solicitation includes actively contacting your co-workers. There are also several rules and regulations which prohibit using Government resources for personal purposes. While you may on an infrequent basis (1 to 2 times a year) set out an order form for a short period of time (one week) in an office common area to give your co-workers a chance to buy a product, you may not do so on a regular basis and you must not ask your co-workers if they want to order something from you. On the other hand, you should not use any other Government resources to announce the opportunity to purchase items from you. The general rule is that you may use Government resources (e.g. duty time, email, telephone, computer, fax) for personal purposes only if it is approved by your supervisor, the use is minimal and does not interfere with the performance of your official duties and results in no cost, or a negligible cost, to the Government (5 CFR 2635.704).

Fancy that,
Counsel

CHOWDA IS OUTTA HERE!

Dear Counsel,

My official duties often require me to travel from Langley to Boston, MA. As I'm sure you'll agree (as all lawyers do), Boston has the world's best clam chowder. While TDY, I plan to use my Government travel card to buy myself a chowder dinner at Union Oyster House in Boston. While there, may I also charge a souvenir hat for myself and some chowder mix to take back to my Langley coworkers?

Thanks,
Go Sox

Dear Sox,

With very limited exceptions you are **required** to use your Government travel card (GTC) for **all** "official travel expenses" (See, 5 USC 5707 and FTR 301-51.1) Official travel expenses include transportation, lodging, meals, and limited incidentals (e.g. minor items necessary for basic hygiene) However, you are prohibited from using your GTC for anything other than official travel expenses (See, 5 USC 5707 and FTR 301-51.6) Thus, it is acceptable for you to use your GTC to charge your TDY dinner at the Union Oyster House. However, it is **not** permissible for you to use your GTC to purchase a souvenir hat and to-go chowder mix for your coworkers (even if it is the world's best), as these are personal expenses not necessary for the performance of your official duties.

The yanks are comin,
Counsel

Legal Kudos

LaRC OCC's Ethics Program Receives Kudos from the Office of Government Ethics (OGE)!

Langley Research Center (and the Marshall and Johnson space centers) will be receiving a 2010 Ethics Program Award! LaRC's Ethics Program Award is presented in recognition of outstanding achievement in managing the ethics program, including:

- Holding regularly scheduled meetings between ethics officials and LaRC's leadership
- Issuing the Center Director's Ethics Policy Statement
- Providing public and confidential disclosure filers with cautionary memorandums
- Including senior staff in ethics training sessions for public filers
- Leveraging ethics-training resources and developing focused training for agency leadership
- Posting periodic ethics-related notices on LaRC's Home Page

Congratulations to Ken Goetzke, who serves as LaRC's primary deputy ethics counselor, and the Human Resources & Ethics Law Team that oversees the ethics program @ LaRC.

Ken will represent LaRC OCC at the OGE awards ceremony the week of June 7th.

SAVUTE!

Congratulations to LaRC OCC's Tom McMurry. Tom has been recognized as the top Army reservist attorney for 2010

Tom McMurry was selected as the Army Reserve Judge Advocate to receive the 2010 Judge Advocates Association's Outstanding Career Armed Services Attorney Award. The award recognizes outstanding service throughout the course of a Judge Advocate's career. Tom is a Lieutenant Colonel in the Reserve JAG Corps with 22 years of service and currently is the Deputy Human Resources Officer for the US Army Reserve Legal Command to which all of the Army Reserve Legal Units comprised of approximately 1400 personnel are assigned and managed

Great Job!

Legal Kudos to Donna Reed and Cynthia Dea of Procurement for referring certain proposed P-card purchases to OCC for legal review. Donna and Cynthia's referrals not only ensure that appropriated funds are used for proper purposes but also they help avoid potential ratification actions and personal financial liability for employees!

Lawyer Humor

They say lawyers are as honest as everyone else, but this is not very encouraging...



Q: Mrs. Johnson, how was your first marriage terminated?

A: By death.

Q: And by whose death was it terminated?



Q: Doctor, how many autopsies have you performed on dead people?

A: All my autopsies have been performed on dead people.



CHURCHILL's COMMENTARY ON MAN:

Man will occasionally stumble over the truth,
but most of the time he will pick himself up and continue on.



BIERMAN's LAW OF CONTRACTS:

1. In any given document, you can't cover all the "what ifs".
2. Lawyers stay in business resolving all the unresolved "what ifs".
3. Every resolved "what if" creates two unresolved "what ifs".



HERBURGER's LAW OF SMALL-TOWN LAWYERS:

Where there is only one lawyer in town, the lawyer can't make a living,
but when there are two lawyers in town, both will make a good living.

